

# Case Comment

## LEGAL APPLICABILITY OF BLOOD GROUP TESTS\*

It has been estimated that the percentage of cases in which an innocent man has been unjustly accused of being the father of an illegitimate child is unduly high. On behalf of a client who is a defendant in a bastardy proceeding or in a prosecution for criminal assault, counsel would often welcome the opportunity of securing evidence of a scientific nature which would establish the innocence of the accused, and hence eliminate the necessity of relying upon evidence of a circumstantial nature to the extent which has been necessitated frequently in the past.

At the present time, the possibility of increasing the practical application of results achieved by scientific investigation concerning the characteristics of blood is attracting a considerable amount of attention among certain branches of both the legal and medical professions. Human blood has been classified, as is becoming increasingly widely known, as belonging to one of four groups, depending upon the presence or absence of certain chemical substances. The presence or absence of two such substances, which accounts for the four possible combinations, gives the blood certain characteristics which remain constant, and which are transmitted from parent to off-spring in accordance with the well-established Mendelian law of heredity. On the basis of this knowledge, blood tests of the mother, the child, and the alleged father reveal in a certain percentage of cases that the man could not possibly be the father of the particular child. The only method by which one of these substances can be present in the blood of the off-spring is by inheritance from one of the parents. Consequently if the blood of the mother does not contain a substance found in that of the child, one whose blood did not contain that particular substance could not be the father of that particular child.

In cases other than those in which the test establishes the fact of non-paternity, the result of the test is not conclusive—no more definite conclusion being possible than that the man *might* be the father of the child. The number of cases in which it is possible to establish non-paternity by this method has been estimated to be about one-third of the total number of cases tested. This computation is based upon the assumption that not only the two substances referred to as A and B, which are used for the purpose of defining the four groups into which all individuals are classed, but also that two others designated as M and N shall be taken into consideration. In a given case, the probabilities of establishing non-paternity depend upon whether the individual belongs to one of the more common blood groups or to one of those more rarely found.

Dr. L. H. Snyder, Professor of Medical Genetics of the Ohio State University College of Medicine, has shown a considerable amount of interest in the practical application of this branch of scientific knowledge and has devoted a large amount of time to the study and development of the technique of

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making these tests. At the present time he is developing other tests which it is anticipated will enable the fact of non-paternity to be established in a very high percentage of cases.

Assuming then that it might be possible to establish the innocence of a client by the use of the blood-group test, what are the possibilities of securing a court order that such a test be made, and would any legal obstacles be encountered in the introduction in evidence of the results of such a test?

At least three Ohio trial courts have encountered the first of these questions and each has decided in favor of the propriety of granting such an order. On Feb. 6, 1934, a blood test was made as ordered by the Court of Common Pleas, Pickaway county, Ohio, on motion of counsel for defendant in the case of *State, ex rel. Jones v. Dern* (No. 17106). In *State, ex rel. Mae Mitchell v. Lester Baker* (No. 27554), Judge Slabaugh of the Court of Common Pleas, Licking county, Ohio, granted such an order on Feb. 13, 1934. A similar order has been granted in a criminal case by Judge Thomas of the Vinton county court.

The first case was settled out of court after the test was made. In the other two cases, the test revealed that the defendant might have been the father of the child and evidence of the result was not offered by either side at the trial. Dr. Snyder conducted the test in each case.

The action of the trial court in these cases appears to be in harmony with a decision of the Supreme Court of Ohio. In *S. S. Kresge Co. v. Trester*, 123 Ohio St., 383, 175 N. E., 611 (1931), the court held a trial court has the power to require a plaintiff in a personal injury action to submit to a reasonable physical examination in order that the nature and extent of injuries may be ascertained.

Outside of Ohio, two courts have dealt with this problem. The status of each case at the present date is to the effect that an order of this type is not proper. In *State v. Damm* (S. D., 1933), 252 N. W., 7, the Supreme Court of South Dakota held that it was not an abuse of discretion for a trial court in a criminal prosecution for rape to refuse to order a blood test to be made. However, a rehearing was granted by the court on Feb. 7, 1934, further developments not appearing at the date of publication. The New York Supreme Court in *Beuschel v. Manowitz*, 151 Misc., 899, 271 N. Y. S., 277 (1934), held that an order at the request of defendant subjecting plaintiff and her child to blood group tests should be granted, but this decision was reversed by the Appellate Division in 272 N. Y. S., 165 (1934).

Recent literature concerning this topic is quite extensive. Dr. Snyder has written a book, "Blood Grouping in Relation to Clinical and Legal Medicine," which is the standard text upon the subject in all English-speaking countries. Legal periodical articles and notes include: "Evidence—Admissibility of Blood-Group Test," 32 Mich. Law Review, 987 (May 1934), "Admissibility in Evidence of Results of Landsteiner Blood Grouping Tests," 43 Yale L. J., 651 (Feb. 1934), "Criminal Law—Evidence—Blood Tests," 9 Wis. Law Rev., 314 (April 1934), "The Evidential Value of Blood Tests," 1 U. of Chi. Law Rev., 798 (May 1934), "Evidence—Admissibility of Blood Group Tests to Establish Non-Parentage," 82 U. of Pa. Law Rev., 654 (April 1934), "The Chances of Establishing Non-Paternity by Blood-Grouping Tests," 20 Jour. Amer. Inst. of Crim. Law, 360 (1929), "Blood Tests for Paternity,"

12 A. B. A. J., 441 (1926), "The Four Blood Groups in Evidence," 76 Solicitors' Jour., 138 (1932), "Bernstein Blood Test as Evidence," 66 Irish Law Times, 111 (1932).

In regard to whether there would be any objection to the introduction in evidence of the results of such a blood test, no Ohio decision has been discovered. The only case encountered bearing upon that point is a criminal bastardy action brought in Pennsylvania. Expert testimony based upon blood tests was given in evidence to show that the defendant could not have been the father of prosecutrix's child. The jury disregarded the evidence, found the defendant guilty, and the trial court sustained the verdict. The county court reversed the decision upon appeal and granted a new trial upon the ground that, in view of the uncontroverted expert testimony based on scientific knowledge, the verdict was not supported by the evidence. *Commonwealth v. Zamorelli*, 17 Pa. D. & C., 229 (1931).

In the ordinary case of this character, it would appear that no very substantial objection could be offered to the introduction of evidence of this nature. Consequently, an improvement is made possible in the conduct of cases of this character by the availability of a new type of evidence.

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#### RIGHT OF MORTGAGEE OF A SURETY TO COMPEL A PRIOR MORTGAGEE TO RESORT TO A PERSONAL REMEDY AGAINST HIS PRINCIPAL BEFORE APPROACHING PROPERTY OF THE SURETY MORTGAGED AS SECURITY

Charles A. Wheeler executed promissory notes to Ollie, Grover, and Floyd De Long. Charles E. Wheeler was surety on the notes; as security he executed a mortgage on property owned by him alone. Charles E. Wheeler subsequently executed a second mortgage on the same property to the defendant Rockey to secure the individual debt of Charles E. Wheeler. Plaintiff is the assignee of the notes and mortgage executed to the De Longs; she prays for an in rem foreclosure; no personal judgment is asked. Charles E. Wheeler died before the suit was instituted. His heirs and Rockey are the defendants. Rockey alone answered. He alleged that Charles E. Wheeler died insolvent, that insufficient funds will be realized from a sale of the property to satisfy both mortgages and that Charles A. Wheeler, the principal on plaintiff's notes, has property. He prayed that plaintiff be required to take a personal judgment against Charles A. Wheeler and levy on his property before resorting to the proceeds of the mortgaged land.

*Held.* The remedy of marshaling assets is not available when its application will delay or inconvenience the paramount incumbrances in collecting his debt. To secure relief under the doctrine of marshaling assets both funds must belong to the same debtor and the senior creditor must have a lien on both funds. *Parker v. Wheeler et al.* 47 Ohio App. 301 (Ohio Bar Aug. 27, 1934).

The remedy of marshaling securities rests on the equitable principle that a person having two funds to satisfy his claims shall not at his pleasure be able to defeat the claims of a party having but one fund. Pomeroy, Equity jurisprudence 2nd Ed., vol. 5, pp. 5078. Being an equitable remedy it must be